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No....., Misc.

IN THE

Supreme Court of the United States

October Term, 1984

VICKIE SINGER, et al.,

Petitioner,

vs.

ROBERT WADMAN, et al.,

Respondents.

VICKIE SINGER, et al.,

Petitioner,

vs.

WALTER D. TALBOT,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

KATHRYN COLLARD
COLLARD, PIXTON
IWASAKI & DOWNES
417 Church Street
Salt Lake City, Utah 84111

GERRY SPENCE
(Counsel of Record)
ROBERT P. SCHUSTER
SPENCE, MORIARITY & SCHUSTER
P.O. Box 548
265 West Pearl Street
Jackson, Wyoming 83001
307-733-7290

Counsel for Petitioner

QUESTIONS PRESENTED

In a case in which compelling constitutional issues under the First and Fourteenth Amendments have been improperly aborted at the birthing bed by summary judgment and all evidence of the judicial misdeed is concealed in a mammoth record — will this court in a proper case nevertheless grant a writ and undertake review where it is patently clear:

1. that the judicial environment for the case is so likely to result in both a miscarriage of justice and the concealment of grave constitutional issues, and the Petitioner is so uniquely unable to protect herself against abuses of an interested judiciary that, despite a record which appears regular, the presence of error is probable, and
2. the circuit court has abdicated its duty to review, leaving the Petitioner without remedy and this court without opportunity to review compelling constitutional issues?

LIST OF ALL PARTIES

The parties to the case known as Vickie Singer, et al., vs. Robert Wadman, et al., are the following: Mrs. Singer brought the case individually and in a representative capacity for the Estate of John Singer, for John Singer, and their children, Heidi Singer Swapp, Suzanne Singer Bates, Timothy Singer, Charlotte Singer, Joseph Singer, Benjamin Singer and Israel Singer. The defendants in the case are: Robert Wadman, South Summit School District, Val D. Edrington, Scott M. Matheson, Ron Robinson, Larry Lunnen, Robert Adkins, Terry Christiansen, Larry Henley, Floyd Farley, Robert A. Bates, Grant Larson, Lewis Jolley, Tom Carlson, David Fullmer, Ron Gunderson, Joe Scouten, Robert Hayward, and Bill Riggs.

The companion case known as Vickie Singer, et al., vs. Walter D. Talbot has the following parties: Mrs. Singer has brought the case individually and in a representative capacity for the Estate of John Singer, for John Singer, and their children Heidi Singer Swapp, Suzanne Singer Bates, Timothy Singer, Charlotte Singer, Joseph Singer, Benjamin Singer and Israel Singer. The defendant in the case is Walter D. Talbot.

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VICKIE SINGER, et al.,

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vs.

WALTER D. TALBOT,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petitioner Vickie Singer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on the 27th day of September, 1984. The circuit court abdicated its review jurisdiction to the district judge from whose summary judgment appeal to the circuit court had been taken, thereby permitting the trial judge, whose interest in the case was fundamental, to stifle crucial constitutional issues under the First and Fourteenth Amendments by the granting of summary judgment before such issues could develop as a mature case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported; it appears in the Appendix hereto at page A-1.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on the 27th day of September, 1984. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First[1] and Fourteenth[2] Amendments to the United States Constitution.

STATEMENT OF THE CASE

John Singer, a fundamentalist Mormon living in Utah, was shot and killed as the climatic act that terminated a controversy of several years between the Singers and the State of Utah over the right to educate the Singers' seven children. The struggle was finally lost when John Singer was struck in the back at least twice by state officers who shot him as he fled for the protection of his

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[1]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[2]Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

house. He fell and bled out in the snow while his wife and children watched helplessly from the window. But the bullets that ripped through John Singer's body exploded from the concerted efforts of men who, having the unfettered power of a great Church-State, allied themselves against a dedicated but powerless family to force them to submit to the dictates of The Church and State — knowing that such a family was without means or position to preserve their rights under the First and Fourteenth Amendments of the United States Constitution.

Every official involved with the Singer case, including the federal district judge, was a member of the dominant church, the Church of Jesus Christ of Latter Day Saints, whose members are generally known as the Mormons. That Church demands fealty to God's law, even of its civil judges, as divine law is revealed from time to time by the Church President, and all members of The Church are required to "sustain the presidency" which simply means that members must agree that the President receives the word of God who is empowered therefore to speak for them, to interpret for them and finally to act for them and through them. The Singers refused to "sustain the presidency" believing that every person is responsible for his or her own acts. They were forthwith tried for apostacy by The Church court, found guilty, and excommunicated.

This was a family devoted to religion and old-time self-reliance. Their principal goal in life was to rear their children free from drugs and sex and other improper influences they found flourishing in the public school system and to teach their children to "walk upright before the Lord" as was the admonishment of the Scriptures. After long and fervent prayer the Singers finally decided they must remove their children from the public schools, basing their right to do so upon their religious convictions protected under the First Amendment of the United States Constitution. Following the example of many families through-

out the state, they organized a private school by incorporating under the laws of Utah. They constructed a small schoolhouse with their own hands and proceeded to teach their children the standard subjects as well as religion, farming, carpentry, mechanics and other life skills. They thought a child in this day and age should learn how to raise food, care for animals, sew clothing, repair machines and build a home.

That the Singers should thus express such independence constituted an intolerable confrontation to the school board members and other officials of the South Summit School District, all of whom were members of The Church. Led by the school principal (who had also been one of The Church judges who had excommunicated the Singers), The Church fathers immediately sought to bring the Singers into line.

At first the Singers attempted to cooperate by eagerly demonstrating that, despite impoverished resources, they were properly educating their children at home. They were proud of their school and of the personal sacrifices they had made in order to undertake this very large responsibility. But the Singers soon discovered that the issue was not whether the children were being adequately educated, but who had the power to educate them. The school officials were determined to build a case against "this renegade Mormon," as John Singer was labeled by the church-owned press in Salt Lake City. To build their case the superintendent of schools demanded testing, and the school psychologist (who was also a presiding official in the superintendent's own church) obligingly tested. When further "confirmatory tests" were needed for the school to make its case, a psychologist from the University of Utah, who also held important positions in The Church, was summoned and readily confessed that so far as he was concerned the will of God would always prevail over his science if the two ever proved to be in conflict.

But when the juvenile court judge, also a Church member, was asked *ex parte* by the prosecutor to take action against the Singers, the judge replied, like Pilate, that he could find no crime against them. The prosecutor told the school superintendent of the judge's decision. Rather than accept this result, the superintendent proceeded to mount a campaign to intimidate the juvenile court judge into permitting the prosecution. The superintendent called on the State Superintendent of Public Instruction who was on the Judicial Supervisory Commission that would review the judge's petition for retention the following summer. The State Superintendent, a Church member, now also unbeknownst to the Singers, and also *ex parte*, urged the judge to take action against the Singers and in pursuit of this goal enlisted the aid of the Attorney General of the State of Utah, a Church member, to counsel with the judge. The school board minutes admit that the Attorney General's office called the judge in and "put the pressure on him." Faced with this conspiratorial opposition, the judge permitted the Mormon prosecutor to charge the Singers with child neglect and ordered the Singers to come before his court.

John Singer personally defended himself and his family as best he could, attempting to reason with the court. Being untrained in the law he based his arguments principally on the Scriptures. But in January of 1978, the juvenile court found that the Singers had violated the juvenile laws by educating their children at home. Thereafter, the superintendent, exuberant and zealous in victory, stated in a public meeting of the local citizens that "he intended to press the issue, and if that meant that John Singer was shot, then that is the way it would be."

Through the various complicated court proceedings that followed, these humble people struggled alone with only prayer to guide them. When the Singers found they could not reason with the authorities they gave up appearing before the court,

and were soon found in contempt. Warrants were issued, and *ex parte* conferences were held with the judge by law enforcement officers, also members of The Church, in which the officers beseeched the judge to permit their use of deadly force against the Singers. They sought the deletion of language from the arrest order that had previously required officers to conduct arrest attempts in such a way as not to do bodily harm to the Singers. The judge finally relented, and the officers were free to use whatever force was necessary, including deadly force.

In October of 1978, law enforcement officers, posing as newsmen from the Los Angeles Times, suddenly jumped Singer in an arrest attempt. Singer, with the help of his wife, struggled free and brandished a gun to ward off what he believed to be this unwarranted physical attack by impostors. News of this aborted arrest attempt leaked out, and the national press took up a hue and cry, vilifying such carryings-on by law enforcement. A firestorm of adverse publicity descended upon the state from across the nation, the Governor receiving letters of protest from nearly every state and from many foreign lands. The Governor, also a Mormon, seeking to quiet the matter, acknowledged that the actions of the officials had been excessive and were not to be countenanced; he promised personally to supervise all further arrest plans. But the State, humiliated by this simple fundamentalist who had captured the fancy of the press, brought down its entire forces upon him. The State enlisted the local sheriff's office and the heads of the various state law enforcement agencies, including the Highway Patrol, the State Narcotics and Liquor Law Enforcement Division, as well as the entire forces available to the Governor, including requests for the National Guard. All of this force focused on this simple "renegade Mormon" who dared defy the Church-State, but who, in truth, only wished to be left alone to educate his children in peace at his lawfully incorporated private school.

These men wielding the great power of the Church-State began considering a variety of extreme actions against this one family, such as poisoning the family's drinking water with tranquilizers and attacking their log cabin home with an armored car. But finally a plan was devised which officers involved in the arrest would later call "stupid" and "dangerous," and which expert witnesses would testify was reckless, grossly negligent, and in violation of even the most basic principles of sound law enforcement.

The shooting of John Singer followed approximately eighteen days of surveillance by the officers. During that period, they masqueraded as skiers and snowmobilers with the intentional purpose of making the Singer family believe that the officers were not police officers. One morning, as Mr. Singer was coming down his snow-covered lane to collect the family mail, these men, paired in groups of two on five snowmachines, roared toward him, brandishing handguns and shotguns loaded with .00 buck.

The true identity of these men continued to be deceptively concealed, so that a material question of fact existed as to whether Singer even knew that the men were police officers: the officers did not have obvious markings identifying themselves as police, nor did the snowmachines have "police" written on them; little shoulder patches were worn by some officers, and some officers say that "police" was written on the back of their jackets, but such markings could not be observable to a man who was running with his back to this group of invaders on five roaring snowmachines with five loaded shotguns; members of this shooting team even testified no one called out that they were "police."

Singer, believing he was being attacked by strangers and being confronted with an onslaught of heavily-armed men, first brandished a gun to frighten this fearsome invasion, and then, seeing that this was futile, he ran for the protection of his home.

Before he could reach its safety, he was shot at least twice in the back by at least two officers, after which he was dumped into a pickup truck without first aid, and hauled — like so much baggage — to the hospital where he was declared dead on arrival.

Officers in the shooting team would later admit that the arrest plan was so "stupid" and "dangerous" that the killing of John Singer was predictable prior to the time it was unleashed. It was a death plan, not an arrest plan, by the admission of the defendants themselves. Expert witnesses, such as Dr. Richard Kobetz, agreed with members of the shooting team, and labeled the plan as the equivalent of a death plan. Chief Maurice Cullinane testified that the officers violated basic and fundamental police procedures in executing the arrest plan, and that such failures were grossly negligent.

What followed after Singer's death was a massive effort by the officials to cover up the killing. News releases were made in which the officials claimed Singer was shot only once in self-defense, and the fact that he was shot in the back was concealed. Evidence was "lost" or never preserved in the first place. The autopsy, also performed by a member of The Church, proved not only to be incomplete, but the autopsy report was concocted to conform with the official scenario of a shooting in self-defense.

Later Mrs. Singer, on behalf of herself and her seven children, filed suit against the school officials, the Governor, the various other officials and law enforcement officers involved in the case in the United States District Court in Salt Lake City, in alleging violations of their civil rights under 42 U.S.C. 1983. The federal district court judge, one David Winder, was also a member of The Church, as were all federal judges in the district, and this particular judge had received his first appointment to the bench as a state court judge from one of the defendants in the case,

the Governor.

Discovery in the case consumed the most part of two years. Seventy-eight witnesses gave their depositions — tens of thousands of pages of testimony were taken and numerous court hearings were held including one in which Mrs. Singer herself humbly requested Judge Winder to withdraw from this case. Although she told him she remembered him in her prayers, she believed the burden would be too heavy for him, as a member of The Church, to bear. But the judge refused to recuse himself. Thereafter, Judge Winder granted summary judgment in favor of all defendants and in a 218-page decision concluded, despite his recital of 150 pages of facts, that there were no material issues to be decided by a jury. On appeal, the Tenth Circuit Court of Appeals took two years to simply adopt Judge Winder's opinion without making any apparent independent review of their own of the record in the case.

REASON FOR GRANTING THE WRIT

The rights and issues in this case are clearly constititonal and beg justice. Yet the mature, compelling themes that deserve the blessing of a writ are not exhibited here since this case was dismissed in its infancy by the trial judge before the constitutional question could raise its head from the birthing bed of a jury trial.

The case engendered national outrage at the time of the killing. Thereafter a nation wondered how it was that the case of a widow and her seven children for the contemptuous, senseless slaying of her husband, whose most serious offense had been to confront the State, could not be heard by a jury in the courts of the United States. The widow wondered, as did the children.

The lawyers for the Estate of John Singer also wondered — how is it that the search for justice can be reduced to little more than a heartless intellectual game, the object of which is to make the correct moves on the game board of justice so that, although

justice remains undelivered, the opponent is beaten?

John Singer, who was a refugee to America, laid down his life pursuing a principle of faith — that in America he was guaranteed the right to educate his children according to his religious beliefs. He exemplified that most innocent trust held by the people of this country: that citizens are still free to live and worship without interference from the state. He believed that in a changing, frightening world in which little is any longer sacred or secure, the right to religious freedom remained immutable. He was proved wrong in Utah by two bullets in the back fired from the muzzles of the guns of a Church-State whose immense, unchallenged power and unfettered arrogance had left it insolent, imperious, and indifferent to the rights of a humble citizen who had chosen to oppose it. But the power of the State was so immense that his case, even in the federal court, was never permitted to see the light of day.

Important factual issues begging resolution by the jury were everywhere evident in this case, as will be summarized momentarily. But the winning move, resulting from the lower court's ruling, was to let the widow and children exhaust themselves in over two years of pretrial struggle that included the taking of seventy-eight depositions covering tens of thousands of pages at an expense poor people could not absorb, and then, feeling quite assured that no reviewing court would trudge through such a record, summary judgment was granted. Such a move, of course, left the Petitioner nearly helpless. It came as no surprise to anyone that the circuit court would not care to trek out into this wasteland of vague and distant horizons lest it get lost, or at least separated from home for a long spell. It did not. With summary language which hardly concealed its refusal to take on this gargantuan task, the circuit court merely adopted the opinion of the lower court, never attempting to formulate the issues, or to consider or dispose of them, and merely ordered

that the opinion of the trial court be published in explanation of its holding.

In short, there was no review of the case at the circuit level. Understandably, considering the record, that court merely rubber-stamped Judge Winder's decision which took 218 pages of wrestling with the facts to determine there were no material facts at issue. With uncharacteristic acceptance of all the lower court's actions, the circuit court found that "The district court gave this matter careful consideration" (A-6) without giving any of its own, finding further that "the district court fully reviewed all the applicable authorities and concluded that summary judgment was proper" (A-6) without having done so itself.

Since it is obvious from the opinion that the circuit court never ventured into the record, that court was in no position to make reference to any of the factual issues in its opinion and could only say that it adopted in full the recitation of the lower court. "Accordingly, we do not see any good reason to reiterate here that which the district court has already well said." (A-7) But the ruling of the trial court had so aligned the pieces on the game board that the chances of any kind of review had been made almost impossible.

Yet has not the question of "excessive force" in arrest always been a jury question except in the clearest cases? Has not the existence of a conspiracy to deprive a citizen of his civil rights always been a matter for jury resolution except when no substantial conspiratorial facts have been demonstrated in the record? Has not the interpretation of the alleged conspiratorial acts of the defendants typically been left to the decision of twelve reasonable jurors? Have the arguments of a judge's ruling which attempts to cause facts in the record to vanish ever been acceptable as a substitute for a jury's determination of the meaning of those facts? In this case it took Judge Winder 218

pages to show that there were no facts at issue. To buttress his opinion he issued a variety of vitriolic excoriations against Petitioner's claim. When Petitioner suggested John Singer was shot twice in the back, the last probably made after Singer lay bleeding out face down in the snow, and that these facts were *bona fide* evidence of excessive force, he labeled such contention as "spurious." When his attention was called to facts such as the following, Judge Winder claimed that he could perceive no material facts in dispute:

— acknowledged experts in the field had testified that the arrest plan preordained John Singer's death,

— defendants themselves admitted that the plan was "dangerous," "stupid," and that it could lead to but one conclusion, namely, John Singer's death,

— nationally recognized authorities such as Chief Maurice Cullinane and Dr. Richard Kobetz testified that the actions of the defendants were grossly negligent, reckless, and violative of basic, fundamental law enforcement procedures.

The record revealed that the officers had posed as snowmobilers and skiers for the days prior to the arrest in order to purposely hide their identity as police officers from Singer and this deception was continued on the day of the shooting. But when it was pointed out to the judge that there was a dispute in the record as to whether Singer understood that these men swooping in on him from all directions brandishing fearsome weapons were police officers, the judge found as a matter of law that "Mr. Singer was aware that these were law enforcement officers attempting to arrest him." He called the clear portrait of the conspiracy in this record "a fairy tale." That the officers were wanton and callous in dumping Singer into their pickup truck without knowing whether he was alive or dead made no difference anyway, the judge said. Was John Singer alive or dead when he

was shoved into the truck by the officers? No one bothered to look. No one seemed to care. That there was no medical aid available at the scene was characterized by the members of the shooting team themselves as "irresponsible" and "terrible" and contrary to standard police procedures. Moreover, the absence of medical care presented a material fact establishing that the defendants knew John Singer would likely be killed, or even darker inferences. Yet Judge Winder dismissed these claims as "utterly without merit."

The trial judge dismissed the eighth claim against the defendants for their violation of John Singer's constitutional rights under 42 U.S.C. 1983 without any analysis. These rights included the following: religious freedom; freedom from malicious prosecution; freedom from harassment, intimidation and outrage; the right to privacy; and the right to life and liberty protected under the due process clause.

There was little question in the record that the officers in furtherance of their conspiracy and in violation of the Singers' civil rights attempted to cover up the unlawful killing. At the scene the most basic steps taken in any case by even inexperienced officers were ignored by the entire team of trained experts. Guns involved in the shooting were not secured; shell casings were not searched for or recovered; proper measurements necessary for reconstruction were not made. Names were hidden. False information was given to the press. The scene was trampled over and shells were lost. The officers' minimum requirements compelled by their own regulations were violated. Even the wrong gun was delivered for the plaintiffs' inspection during discovery, and the sheriff's office lost projectiles removed from John Singer's body at the autopsy. But for the intrusion of an admirer of John Singer at the morgue, who happened to be a medical doctor, no adequate photos of the corpse would have been preserved. Yet these facts so far as Judge Winder was

concerned had no judicial existence.

John Singer was buried. It remained only for the defendants to bury the case of the widow and children. Rather than to reveal the startling truth in the Singer case and its subsequent cover-up, discovery only served to further conceal the facts, since the very magnitude of the record created such a jungle of fact and detail through the endless interrogation of multitudes of witnesses by the numerous attorneys representing the lengthy list of defendants that only the resolute and courageous would enter this jungle to explore for justice after the trial judge had dismissed the case.

This is a case in which the true dimensions of the constitutional issues cannot be measured until the case has matured through the orderly trial processes. Yet, like any victim whose voice has been muted, justice has also been rendered speechless. Although the testimony in the case dragged on for months in the privacy of deposition rooms, and although the testimony of witnesses, lay and expert alike, filled volumes, no one would ever hear the case, no jury, no judges, not the public at large whose knowledge of the behavior of its public officials is our best guarantee against abuse — no one would ever hear this case. It was buried. And the formidable record and the detailed disputation of Judge Winder would convince any subsequent reviewers to let well enough alone.

The very nature of the environment of this case invites abuse and injustice. That this case should be discovered at the door of the highest Court of the land represents merely an extension of the first abuse against John Singer by those who exercised absolute power over him as the representatives of the Church-State. Petitioner has not received justice, nor has she received even the opportunity for justice. In Utah, every person trusted with the administration of justice had an adverse interest to the Petitioner's. Yet, Petitioner was required — in order to pursue her claims against the great Church-State of Utah — to enter

the doors of justice inhabited by that same power structure. The facts have never been permitted to see the light of day. That summary judgment was allowed in such a case argues best for the claims made herein against the pervasive influence of The Church.

Every official whose hands reached in to palpate and to form the justice of this case were the adversaries of John Singer. All saw John Singer according to the judgment of The Church. John Singer was an excommunicate, an apostate — "the renegade Mormon." Rather than justice, what emerged was an image for all to behold, one with all the appearances of regularity, of due process and of constitutionality, even of justice. But what was created was only a monument to gamesmanship and to good moves which allowed justice to perish at birth.

We can say no more. In this brief petition we can prove no more. We can only hope that the wisdom of this Court can detect, if only by judicial instinct, those cases which require review if an orderly and just society is to endure. Our system of justice demands the antiseptic benefit of sunlight. It requires a fair opportunity for the facts to be revealed and heard in courts in which the judges are free of any taint of self-interest.

We have, of course, laid barriers ourselves before the court by repeatedly alluding to the scope of the massive record here. Yet, for this Court to find appropriate solutions it must understand that the nature of this case is one in which justice has been suffocated by the process itself. One solution to the problem posed by this voluminous record would be for the Court to grant the writ and to lay the burden squarely on Petitioner's shoulders to present in her brief the clearly documented evidence supporting the factual issues which entitle her to a trial, failing which the Court can always summarily dismiss. But this Court must continue to perform unheralded and yeoman chores as the guardian of the sacred rights of the American people lest such

blessed muscles, left inactive, atrophy.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Circuit Court for the Tenth Circuit.

Respectfully submitted,

Gerry Spence
Robert P. Schuster
SPENCE, MORIARITY & SCHUSTER

Kathryn Collard
COLLARD, PIXTON, IWASAKI & DOWNES
Counsel for Petitioner

APPENDIX

APPENDIX

United States Court of Appeals, Tenth Circuit.

Nos. 82-2273 and 83-1501

Vickie Singer, et al., Plaintiffs-Appellants, v. Robert Wadman et al., Defendants-Appellees. Vickie Singer, et al., Plaintiffs-Appellants, v. Walter D. Talbot, Defendant-Appellee. Appeal from the United States District Court for the District of Utah - Central Division (D.C. Nos. C-80-0212-W and C-82-0037-W).

Robert P. Schuster (and Gerry L. Spence, Edward P. Moriarity, and Bradley L. Booke of Spence, Moriarity & Schuster, Jackson, Wyoming; and Kathryn Collard of Collard, Pixton, Iwasaki & Downes, Salt Lake City, Utah, with him on the brief), for Plaintiffs-Appellants.

Allan L. Larson (and David W. Slagle of Snow, Christensen & Martineau; and Robert R. Wallace, Assistant Attorney General, with him on the briefs), Salt Lake City, Utah, for Scott Matheson, Robert Wadman, Larry Lunnen, Robert Reid, and Bill Riggs, Defendants-Appellees.

Tim Dalton Dunn of Hanson, Russon & Dunn (Craig S. Cook, of counsel, with him on the brief), Salt Lake City, Utah, for Jolley, Larsen, Farley, Carlson, Fullmer, Gunderson, Schouten and Hayward, Defendants-Appellees.

Glenn C. Hanni (and Robert A. Burton of Strong & Hanni; P. Keith Nelson and Gary B. Ferguson of Richards, Brandt, Miller & Nelson; W. Eugene Hansen and Ralph L. Dewsnup of Hansen & Thompson, with him on the brief), Salt Lake City, Utah, for Ron Robinson, Robert Adkins, and Terry Christiansen, Defendants-Appellees.

J. Michael Hansen (and Stewart M. Hanson, Jr., of Suitter, Axland, Armstrong & Hanson, with him on the briefs), Salt Lake City, Utah, for Larry Henley and Robert A. Bates, Defendants-Appellees.

David L. Wilkinson, Attorney General, and John S. McAllister, Assistant Attorney General, Salt Lake City, Utah, were on the brief for Walter D. Talbot, Defendant-Appellee.

Walter R. Ellett, Murray, Utah, and A. Alma Nelson and Don J. Hanson, Bayle, Hanson, Nelson & Christensen, Salt Lake City, Utah, were on the brief for Val D. Edrington and South Summit School District, Defendant-Appellees.

Before LOGAN, BREITENSTEIN, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

John Singer was shot and killed by law enforcement officer Lewis Jolley on January 18, 1979. Jolley, along with nine other Utah law enforcement officials, was attempting to arrest Singer. At the time of the arrest attempt, there were two outstanding warrants calling for Singer's arrest. One was a misdemeanor warrant based on Singer's conviction for violations of the Utah Compulsory Attendance Law, Utah Code Ann. §§ 53-24-1 and -3 (1981). The second was a felony warrant based on his resistance during a prior attempt to arrest him under the authority of the misdemeanor warrant. The scene of the shooting was in front of Singer's home. As Singer walked towards his mailbox, a team of ten officers on snowmobiles attempted to surround him. The plan was that when confronted with a show of force Singer would surrender. Tragically, he did not, but instead drew a pistol from his waistband and pointed it at the authorities as he tried to run towards his house. It was in this setting that Jolley shot and killed Singer.

Based on this shooting incident, Vickie Singer, the widow, on behalf of herself and her minor children, and as personal representative of her deceased husband's estate, instituted the present action in the United States District Court for the District of Utah against numerous Utah officials, including Lew Jolley, members of the arrest team, the Summit County School District and Superintendent of Schools, the Summit County Attorney, and Deputy County Attorney, the State Superintendent of Public Instruction, and the Governor of Utah. The complaint set forth nine claims for relief, five of which alleged constitutional violations under 42 U.S.C. § 1983, and four were pendent state tort claims. Extensive discovery followed, with the result that approximately seventy-two persons were deposed. The defendants then moved for summary judgment. The district court issued a 218-page Memorandum Decision and Order granting the motion and entered judgment in favor of all defendants. The Singers

appeal.*

Before considering the merits of the appeal, the appellants argue that the trial judge erred in refusing to disqualify himself from the case pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a). The plaintiffs-appellants filed a motion to disqualify the trial judge, the Honorable David K. Winder, to whom the case had been assigned. One of the grounds asserted was that he was a Mormon and that, according to counsel, the case involved, *inter alia*, a challenge to the theocratic power structure of Utah. Plaintiffs also claimed that the trial judge was biased because of his former law partnership with one of the defense counsel. Plaintiffs contended the trial judge's partiality was shown by the numerous caustic remarks aimed at plaintiffs in his 218-page opinion. The trial judge denied the motion to disqualify, and in thus ruling we find no abuse of discretion.

In the first place, the motion to disqualify was not, in our view, timely filed. The motion was filed about one year after the complaint was filed and after the appellants had suffered some adverse rulings on interlocutory matters. Further, the grounds asserted in the motion to disqualify are legally insufficient. See United States v. Ritter, 540 F.2d 459 (10th Cir.), cert. denied sub nom. Olson Farms, Inc. v. United States, 429 U.S. 951 (1976); Parrish v. Board of Commissioners, 524 F.2d 98, 100

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*During discovery, plaintiffs attempted to join Walter D. Talbot, State Superintendent of Public Instruction, as a defendant in the original case. Judge Winder refused to grant plaintiffs' motion to amend their complaint, and so plaintiffs brought a separate suit against Talbot. The trial court granted summary judgment to Talbot on March 17, 1983. On appeal, the two suits were consolidated. Plaintiffs allege in their complaint against Talbot five causes of action: three civil rights violations under 42 U.S.C. § 1983 arising from Talbot's alleged participation in a conspiracy to deprive the plaintiffs of their constitutional rights and two pendent state tort claims for outrage and infliction of emotional distress.

(5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). As for Judge Winder's former partnership with a lawyer for one of the defendants, we do not believe this requires his disqualification. See Miller Industries v. Caterpillar Tractor Co., 516 F. Supp. 84 (D. Ala. 1980). Finally, the various remarks made by the district judge during the course of the proceedings do not, as counsel suggests, substantiate the claim of bias or prejudice. On the contrary, in our view, the district judge exhibited commendable patience and restraint throughout this admittedly and understandably emotional affair.

Turning now to the merits of the case, we first recognize that there is a certain reluctance to grant summary judgment in a civil rights conspiracy case, since the existence or nonexistence of a conspiracy is generally a fact issue. Adickes v. Kress & Co., 398 U.S. 144, 176 (1970). But summary judgment is not always inappropriate, even in a § 1983 suit. The Supreme Court has declared that insubstantial suits need not proceed to trial. Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982). The comment of Judge John Paul Stevens, now Justice Stevens, in Kiess v. Eason, 442 F.2d 712, 713 (7th Cir. 1971), has present pertinency:

> Inevitably in a record of this magnitude the parties' versions of the facts will differ. The same events will be described or recalled differently by different witnesses. What is innocuous to one may appear sinister to another. Such differences do not preclude summary judgment, however, unless they are material to the outcome. (Emphasis added)

The dominant claim for relief is that the defendants, under color of state law, conspired to violate the appellants' civil rights. A civil conspiracy is the combination of two or more persons acting in concert, either to commit an unlawful act, or to commit a lawful act by unlawful means. Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), rev'd in part on other

grounds sub nom. Hanrahan v. Hampton, 446 U.S. 754 (1980). Applying the definition of a civil conspiracy to the instant case, the record indicates beyond any doubt that though the defendants, or some of them, were acting in concert, they were not committing an unlawful act. On the contrary, the defendants were committing a lawful act, enforcing the Utah Compulsory Attendance laws and arresting a person for whom there were outstanding arrest warrants. We note that Singer had been convicted of violating the Utah Compulsory Attendance Law and that he did not thereafter appeal his conviction. In this connection, the district court observed that a citizen might be justified in resisting state regulations which unlawfully infringed on constitutional rights, but only pursuant to "legal remedies," and not by means of the self-help used here by Singer.

There remains the second alternative: Were the defendants carrying out a lawful act by unlawful means? We think the record shows they were not. With respect to the claim for relief alleging excessive force, the depositional testimony shows that Singer, who on prior occasions had stated that he would resist arrest and that any attempt to arrest would involve "bloodshed," resisted arrest on this occasion by pulling a gun from his belt and pointing it at the law enforcement officers. In such circumstances, the deputies did not have to wait for Singer to fire first; they had a right to shoot to kill. Utah Code Ann. § 76-2-404 (1978).

As just stated, we do not believe there were any genuine issues of material facts. Discovery was extensive. The district court gave this matter careful consideration, and, as indicated, filed a 218-page Memorandum Decision and Order. In so doing, the district court set forth the facts in great detail, and we see no need to repeat them here. Further, the district court fully reviewed all the applicable authorities and concluded that summary judgment was proper. We are in accord with the

result reached by the district court, and the reasoning behind such result. Accordingly, we do not see any good reason to reiterate here that which the district court has already well said. Cf. Dennison v. Topeka Chambers Industrial Development Corp., 724 F.2d 869 (10th Cir. 1984).

The Memorandum Decision and Order of the district court was not published. In order to give meaning to our opinion to persons who have not read the district court's opinion, and perhaps do not have speedy access to it, we order that the Memorandum Decision and Order be published.

Judgment affirmed.